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No. 88-357

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

NORM MALENG, KING COUNTY PROSECUTING ATTORNEY; AMOS E. REED,
Secretary of the Washington State Department of Social & Health
Services; KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

v.

MARK EDWIN COOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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EDITOR'S NOTE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Does the District Court have subject matter jurisdiction over a §2254 challenge to a prior state conviction on which the sentence has been served, when the state continues to use the prior conviction to directly enhance a present or future state prison term pursuant to state statutes mandating a longer prison sentence because of the prior conviction?¹

1. The issue is restated in this way because Respondent disputes the use of the words "may" and "unrelated" in the Statement of Question Presented in the Petition. See the Counterstatement of Facts, and Argument, below.

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The Respondent, Mark Edwin Cook, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 847 F.2d 616.

COUNTERSTATEMENT OF THE CASE

The petitioner's statement of the case is incorrect in one crucial respect. Mr. Cook's 1958 Washington conviction has directly enhanced his 1978 Washington sentence.¹ The state, in suggesting there is no real enhancement, conveniently ignores one of the two applicable Washington enhancement statutes cited by the Ninth Circuit. That statute, former RCW 9.41.025, mandatorily lengthens by seven and one half years the time Mr. Cook must serve under his 1978 state sentence as a result of the 1958 conviction at issue here.²

Former RCW 9.41.025 requires that a defendant who is convicted of using a firearm in the commission of a felony, and who has no prior felony convictions, serve a mandatory minimum duration of confinement of five years. This statute further mandates that upon a finding that the defendant has been convicted of one (1) prior felony, said mandatory five-year confinement is to be lengthened by two-and-one-half years to seven-and-one-half years, and that upon a finding that a defendant has been convicted of two (2) or more prior felony convictions, said mandatory confinement is to total fifteen

1. There is some unclarity in the Petition regarding Mr. Cook's most recent state conviction, his third state felony conviction. Mr. Cook was convicted in 1978 of both federal and state charges. The judgment and sentence on the state charges for assault and aiding a prisoner to escape was actually entered in 1978, and is referred to herein as the "1978 conviction", or "1978 sentence". Mr. Cook is currently in federal prison on his 1976 federal conviction; the 1978 state conviction at issue in this case will be served consecutively.

2. The state discusses only RCW 9.95.040. Petition at 3, footnote 2.

years. A copy of former RCW 9.41.025 is attached as Appendix A.³ Mr. Cook's mandatory term is thus directly lengthened by his second prior conviction, the 1958 conviction at issue here.⁴

There is also another statutory enhancement of Mr. Cook's new state prison sentence resulting directly from the 1958 conviction, which was not cited by the Ninth Circuit. This enhancement occurs through the application of the Sentencing Grid the new Washington Sentencing Reform Act (SRA) to Mr. Cook's prison term. That Sentencing Grid is applicable to Mr. Cook's sentence though the operation of RCW 9.95.009(2),⁵ and requires increasing Mr. Cook's presumptive time in custody based directly on the number of prior felony convictions proven.

The 1958 conviction increases Mr. Cook's presumptive sentence on his 1978 conviction by several years. Mr. Cook's 1958 conviction, a prior robbery, increases his total Offender

3. Although former RCW 9.41.025 has been repealed, it clearly still applies to Mr. Cook's case through Washington's criminal penalty "savings" statute, RCW 10.01.040.

4. The 1976 federal conviction would not serve as a second "previous" conviction because the behavior which led to that conviction was contemporaneous with the 1976 behavior leading to the 1978 state sentence. Convictions for contemporaneous behavior cannot be used to enhance each other. State v. Braithwaite, 92 Wn.2d 624, 628-629, 600 P.2d 1260, 1262-1263 (1979).

5. Although Mr. Cook was sentenced under the former sentencing law, RCW 9.95.009(2) mandates that the SRA provisions be considered with regard to old-law prisoners and defendants. Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986). RCW 9.95.009(2) is reproduced in Appendix B. The SRA provisions would have an enhancing effect on Mr. Cook's sentence due to the 1958 conviction even if RCW 9.95.040 or former RCW 9.41.025, discussed above, did not enhance based on the 1958 conviction. Addleman holds that, even though the SRA is not technically fully retroactive, the SRA standard range is the presumptive sentence, from which departure is allowed only on adequate written reasons. One such reason is "statutory preclusion," Addleman, 107 Wn.2d at 511, 730 P.2d at 1332, which means that mandatory prison terms required by RCW 9.95.040 and 9.41.025 take precedence if they are longer than the SRA presumptive term. In re Hunter, 106 Wn.2d 495, 723 P.2d 431 (1986). If such mandatory terms are shorter than the SRA presumptive range, or if there were no other mandatory terms under prior law, then the SRA range would constitute the presumptive prison term.

Score by "2" points and thereby increases his Standard Sentencing Range from a lower range of eight years, four months and an upper range of 11 years, one month ("midpoint" nine years, nine months) with an Offender Score of "5", to a lower range of 11 years and seven months and an upper range of 15 years, five months ("midpoint" 13 years, six months) with an Offender Score of "7".⁶ Thus, the 1958 conviction increases the lower range by three years, three months, the upper range by four years, four months, and the "midpoint" by three years, nine months.

The suggestion throughout the petition that the sentence enhancement from the 1958 conviction is only "collateral" or theoretical is thus incorrect, both as a matter of fact and as a matter of Washington law.

REASONS WHY THE PETITION SHOULD BE DENIED

- I. AS A MATTER OF WASHINGTON STATE LAW, RESPONDENT'S 1978 PRISON TERM IS NECESSARILY ENHANCED BY HIS 1958 PRIOR CONVICTION. THE NINTH CIRCUIT'S CONCLUSION THAT RESPONDENT THEREFORE CAN QUESTION THE CONSTITUTIONALITY OF THE 1958 CONVICTION IN HABEAS CORPUS IS CORRECT AND CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS WHICH HAVE FACED THE SAME QUESTION.

The State's petition seriously distorts the findings on which the Ninth Circuit relied to make its decision. The State claims that the Ninth Circuit "reasoned that since [Mr. Cook's expired] 1958 conviction 'might' increase Mr. Cook's minimum term

6. The Sentencing Grid of the SRA provides Standard Sentencing Ranges for defendants and prisoners based on the seriousness level of the current offense cross-referenced with the total number and the nature of additional current offenses and prior offenses. RCW 9.94.310 and RCW 9.94.320. The seriousness level is determined by the most serious offense, Assault I in this case. RCW 9.94A.400(3). Mr. Cook's Offender Score totals "7" points as he is given "3" points for his second current assault offense, and "2" points each for each set of prior robbery convictions, the 1958 set and the 1965 set. RCW 9.94A.310 and RCW 9.94A.330. Cross-referencing the offense seriousness level, "XI" for Assault I, with his Offender Score "7" on the Sentencing Grid results in a Standard Sentencing Range for Mr. Cook of a lower range of 11 years, seven months and an upper range of 15 years, five months (with a "midpoint" of 13 years, six months). RCW 9.94A.310 and RCW 9.94A.370. See the excerpts from relevant statutes attached as Appendix C.

on a subsequent state sentence. . . he is 'in custody' on the 1958 conviction for purposes of 28 U.S.C. §2254 subject matter jurisdiction." Petition at 4. But the Ninth Circuit found instead that the 1958 conviction does directly enhance Mr. Cook's 1978 state sentence by operation of specific statutes:

In this case the State used Cook's 1958 conviction to enhance his 1978 sentence. See Wash. Rev. Code §§9.95.040 (1988), 9.41.025 (repealed 1984) (enhancement statutes); see also, Wash. Rev. Code §10.01.040 (1980 & Supp. 1988) (general criminal penalty "savings" statute). Cook is challenging the use of the 1958 conviction to enhance that sentence. If the 1958 conviction is invalid, it should not have been used to enhance the 1978 sentence. See State v. Gonzalez, 103 Wn.2d 564, 567, 693 P.2d 119, 121 (1985) (State must prove validity of prison conviction used to enhance sentence); State v. Barnes, 42 Wash. App. 56, 57, 708 P.2d 414, 145 (1985). If the enhancement of the 1978 sentence is invalid, the length of Cook's impending state imprisonment might be reduced by as much as seven and one-half years. See Wash. Rev. Code §§9.95.040(2), 9.41.025. Therefore, because Cook's 1958 conviction lengthened his 1978 sentence, the district court erred in dismissing Cook's petition for want of subject matter jurisdiction.

Cook v. Maleng, 847 F.2d 616, 618-619 (9th Cir. 1988). Moreover, as is shown above in the Counterstatement of the Case, the Court of Appeals was correct as a matter of fact and as a matter of Washington law that the 1958 conviction does work a direct enhancement on the newer state sentence.⁷

Significantly, it would have been inconsistent with Washington law to hold that Mr. Cook cannot challenge his 1958 state conviction when it was used to directly enhance his 1978 state conviction. The State Supreme Court in the present case ruled in 1984 on the merits of Mr. Cook's state post-conviction petition challenging the 1958 conviction. Washington law requires that the State prove the constitutional validity of

7. The fact that Mr. Cook's state sentence has not yet commenced is of no consequence. Mr. Cook is currently in federal prison, and his new state sentence will commence upon his release. There is no longer any question that Mr. Cook's future state incarceration is "custody" under the habeas statute. Payton v. Rowe, 391 U.S. 54, 20 L.Ed.2d 426, 88 S.Ct. 1549 (1968). The State in this case appropriately does not appear to view the future nature of the state custody as an issue.

prior convictions used to enhance sentence. State v. Holsworth, 93 Wn.2d 148, 607 P.2d 845 (1980). Washington law also clearly permits a later collateral challenge to prior convictions underlying an enhanced sentence. In re Hays, 99 Wn.2d 80, 660 P.2d 263 (1983), overruling In re Lee, 95 Wn.2d 357, 623 P.2d 687 (1980). Moreover, under the new Sentencing Reform Act, applicable in part to Mr. Cook's sentence as shown in the Counterstatement of the Case, the only method of attacking a facially valid prior conviction is through a state post-conviction petition, and then a motion for resentencing after a successful collateral attack. State v. Ammons, 105 Wn.2d 175, 187-188, 713 P.2d 719, 726-727 (1986). The state courts thus claim no interest in preventing collateral attacks on old convictions used to enhance new sentences; on the contrary, the thrust of Washington law is to encourage post-conviction petitions of exactly the kind Mr. Cook presented here.

Moreover, the Ninth Circuit's decision was carefully tailored to find "custody" only where direct enhancement from an expired conviction is present. The actual holding of the Ninth Circuit was explicitly narrow:

We do not hold that jurisdiction afforded by §2254(a) extends to all constitutional challenges to prior convictions upon a showing of some unfavorable collateral consequence flowing from the challenged conviction. The question presented for our decision is a narrow one, namely, whether the custody requirement for habeas corpus relief is satisfied where a prisoner's prior conviction, although expired, is used to enhance the sentence on a current or future term. We conclude the custody requirement is satisfied in such a case. Where the State uses a prior conviction to enhance a present or future sentence, fairness requires that such restraints on individual liberty be justified. See Mansley v. Municipal Court, 411 U.S. 345, 350-51, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

Cook v. Maleng, *supra*, 847 F.2d at 619.

The Ninth Circuit's decision on this issue is clearly consistent with relevant holdings of this Court. See, e.g.,

Burgett v. Texas, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967) (use of constitutionally invalid prior conviction in a state recidivist prosecution renews the constitutional infirmity); United States v. Tucker, 404 U.S. 443, 30 L.Ed.2d 592, 92 S.Ct. 589 (1972) (constitutionally invalid prior convictions could not be considered at sentencing when they may have resulted in a longer term); Johnson v. Mississippi, 486 U.S. ___, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) (constitutionally invalid prior conviction cannot be used to support sentence of death resting on aggravating circumstance requiring proof of previous serious felony conviction; post-conviction relief must be available to cure the defect).

On the narrow issue of "custody" upon direct enhancement, the Ninth Circuit also agrees with every other circuit which has faced it directly. E.g., United States ex rel. Durocher v. LaVallee, 330 F.2d 303, 306 (2nd Cir.) (en banc), cert. denied, 377 U.S. 998 (1964); Lyons v. Brierly, 435 F.2d 1241, 1215-1216 (3rd Cir. 1970); Young v. Lynaugh, 821 F.2d 1133, 1136-1138 (5th Cir. 1987); Harrison v. Indiana, 597 F.2d 115, 116-117 (7th Cir. 1979) and cases cited therein; Aziz v. LaFaire, 830 F.2d 184, 186 (11th Cir. 1987).

The circuit cases the State claims are to the contrary (Petition at 6-7) are not directly contrary. Most of those cases do not deal with "custody" claims by prisoners who claimed a direct, specific enhancement of a current or future state sentence due to an expired conviction from the same state. Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), involved a §2254 challenge to a Virginia conviction which the petitioner claimed was enhancing his federal sentence due solely to federal law provisions. The Fourth Circuit found no §2254 "custody" because the federal prisoner was not subject to further Virginia custody,

then or in the future. Therefore, only a §2255 petition might be cognizable. Likewise, in Ward v. Knoblock, 738 F.2d 134, 138 (6th Cir. 1984), the court held only that §2254 "custody" does not extend to a federal prisoner who had no current or future state sentence to be enhanced, "who has fully served the [state] sentence under attack, and is no longer in any meaningful sense in the custody of the state which imposed that sentence" and said it would not "expand the right to apply for the writ to a case where. . . petitioner's liberty is not at all restrained by the state which imposed the sentence which he was served and now wishes to exclusively attack." (Emphasis added) Again, only a §2255 petition would be available because the petitioner faced only federal custody. This is demonstrably not the situation in the present case: Mr. Cook has a lengthy Washington State prison sentence to serve, a sentence which is directly enhanced by the expired conviction from the same state. Only Cotton v. Mabry, 674 F.2d 701 (8th Cir. 1982), cert. denied, 459 U.S. 1015 (1982) even arguably supports the State's position. But Cotton provides only the weakest hint of support because it is not clear whether a direct, specific current sentence enhancement due to the expired conviction was at issue. The court in Cotton found only that any "influence which the five-year sentence may have had on the subsequent sentences" was not sufficient to confer "custody". 674 F.2d at 703. (Emphasis added) Moreover, even if a specific enhancement was present, Cotton lacks the type of serious analysis of the issue which is present in the other circuit decisions on this issue.⁸

8. The Cotton result is based only on Harvey v. South Dakota, 526 F.2d 840 (8th Cir. 1976), a case in which an expired conviction was attacked when there was no present or future custody of any type pending. Not surprisingly, Harvey held there was no "custody". The Cotton opinion totally fails, however, to discuss any of the authority holding even then that direct enhancements from old sentences do constitute "custody".

On the issue actually before the Ninth Circuit, i.e. a direct enhancement of a specific length of prison time due solely to the expired conviction, the Ninth Circuit's decision was clearly correct. There is "custody" on the old conviction sufficient to confer habeas jurisdiction when a prison term is specifically lengthened in this way. There is no flaw in the Ninth Circuit's reasoning on this easily-answered "custody" question.

II. THE NINTH CIRCUIT'S HOLDING DOES NOT AFFECT THE FINALITY OF STATE CONVICTIONS UNLESS THOSE CONVICTIONS ARE USED TO DIRECTLY INCREASE PRISON TIME ON PRESENT OR FUTURE STATE SENTENCES; SUCH CONVICTIONS MUST REMAIN OPEN TO COLLATERAL ATTACK SO THAT STATES DO NOT ATTEMPT TO LENGTHEN PRISON TERMS BASED ON UNCONSTITUTIONALLY OBTAINED CONVICTIONS.

The State's allegations regarding the effects of the Ninth Circuit decision are simply wrong. The State claims that "the Ninth Circuit has adopted a rule that essentially means that state court convictions are never final". Petition at 4. This is untrue: Under the Ninth Circuit's rule, state court convictions on which the sentence has expired can be attacked collaterally only if the State affirmatively and directly enhances a new prison term by using the expired conviction. If the State never attempts to use the expired conviction in this way, it will never be subject to federal habeas corpus relief. The State itself thus determines ultimate "finality": If the State never resurrects an old conviction in an attempt to make a new term longer, that conviction will never be "live" enough to establish sufficient "custody" to confer habeas corpus jurisdiction. Compare e.g., Burgett v. Texas, supra (state's use of old unconstitutionally-obtained conviction to enhance penalties renews the constitutional violation).

The State also misconstrues what is fair and what is not fair with respect to sentencing systems relying upon prior

convictions for enhancement. See Petition at 7-8, claiming unfairness to the State. But the equities cut exactly the opposite way: As this Court has often made clear, the State's use of prior convictions to directly enhance prison terms would be patently unfair unless a mechanism to test the continuing validity of those convictions is provided. The State can hardly seek to keep persons in its prisons longer based on "evidence" which is constitutionally suspect. See Burgatt v. Texas, supra; United States v. Tucker, supra; Johnson v. Mississippi, supra.

III. THERE IS NO ISSUE PRESENTED REGARDING PREJUDICE TO THE STATE FROM ALLEGED DELAY IN FILING THE HABEAS PETITION.

There is no issue here regarding the alleged unavailability of evidence to refute the habeas petition, as incorrectly suggested in the Petition at 8-10. The State made such a claim in the District Court, pursuant to Rule 9(a) of the Rules Governing §2254 Proceedings In The United States District Courts. But that court did not reach this issue, holding as a threshold matter that it lacked subject matter jurisdiction because it believed Mr. Cook was not "in custody". See District Court opinions, Appendices B and C to the Petition herein. Accordingly, the Court of Appeals also reached no such issue because Mr. Cook's appeal was purely on the "in custody" question on which the District Court did rule. See Court of Appeals Opinion, Appendix A to the Petition. There is no record and no ruling on this claim.

In these circumstances, there is no issue presented in this Court. The issue, if it is one, remains open on remand to the District Court.

CONCLUSION

For the foregoing reasons, the petition for writ of

APPENDIX A

Former RCW 9.41.025 (Pertinent Part):

9.41.025 Committing crime when armed—Penalties—"Inherently dangerous" defined—Resisting arrest. Any person who shall commit or attempt to commit any felony, or any misdemeanor or gross misdemeanor categorized herein as inherently dangerous, while armed with, or in the possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided:

(1) For the first offense the offender shall be guilty of a felony and the court shall impose a sentence of not less than five years, which sentence shall not be suspended or deferred;

(2) For a second offense, or if, in the case of a first conviction of violation of any provision of this section, the offender shall previously have been convicted of violation of the laws of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than seven and one-half years, which sentence shall not be suspended or deferred;

(3) For a third or subsequent offense, or if the offender shall previously have been convicted two or more times in the aggregate of any violation of the law of the United States or of any other state, territory or district relating to the use or possession of a firearm while committing or attempting to commit a crime, the offender shall be guilty of a felony and shall be imprisoned for not less than fifteen years, which sentence shall not be suspended or deferred;

(4) Misdemeanors or gross misdemeanors categorized as "Inherently Dangerous" as the term is used in this statute means any of the following crimes or an attempt to commit any of the same: Assault in the third degree, provoking an assault, interfering with a public officer, disturbing a meeting, riot, remaining after warning, obstructing firemen, petit larceny, injury to property, intimidating a public officer, shoplifting, indecent liberties, and soliciting a minor for immoral purposes.

APPENDIX B:

RCW 9.95.009(2):

(2) After July 1, 1984, the board shall continue its functions with respect to persons convicted of crimes committed prior to July 1, 1984, and committed to the department of corrections. When making decisions on duration of confinement, and parole release under RCW 9.95.100 and 9.95.110, the board shall consider the purposes, standards, and sentencing ranges adopted pursuant to RCW 9.94A.040 and the minimum term recommendations of the sentencing judge and prosecuting attorney, and shall attempt to make decisions reasonably consistent with those ranges, standards, purposes, and recommendations: *Provided*, That the board and its successors shall give adequate written reasons whenever a minimum term or parole release decisions [decision] is made which is outside the sentencing ranges adopted pursuant to RCW 9.94A.040. In making such decisions, the board and its successors shall consider the different charging and disposition practices under the indeterminate sentencing system.

APPENDIX C

1) RCW 9.94A.310 (Pertinent Part):

9.94A.310. Table 1--Sentencing grid

TABLE 1	
Sentencing Grid	
SERIOUSNESS SCORE	OFFENDER SCORE
	0 1 2 3 4 5 6 7 8 9 or (out)
XV Life Sentence without Parole/Death Penalty	
XIII	24y- 24y- 24y- 24y- 24y- 24y- 24y- 24y- 24y- 24y- 24y- 30- 30- 30- 30- 30- 30- 30- 30- 30- 30- 30- 30 33 37 41 45 49 53 57 61 65 69
XII	12y 13y 14y 15y 16y 17y 18y 19y 20y 21y 22y 133- 134- 135- 136- 137- 138- 139- 140- 141- 142- 143- 144 145 146 147 148 149 150 151 152 153 154
XI	6y 6y- 7y- 8y- 9y 9y- 10y- 11y- 12y- 13y- 14y- 63- 64- 65- 66- 67- 68- 69- 70- 71- 72- 73- 82 83 84 85 86 87 88 89 90 91 92
X	3y 3y- 4y 4y- 5y 5y- 6y- 7y- 8y- 9y- 10y- 31- 32- 33- 34- 35- 36- 37- 38- 39- 40- 41- 42 43 44 45 46 47 48 49 50 51 52

2) RCW 9.94A.320 (Pertinent Part):

9.94A.320. Table 2--Crimes included within each seriousness level

TABLE 2
CRIMES INCLUDED WITHIN EACH SERIOUSNESS LEVEL

- XIV Aggravated Murder 1 (RCW 10.95.020)
- XIII Murder 1 (RCW 9A.32.030)
- XIII Homicide by abuse (RCW 9A.32.033)
- XII Murder 2 (RCW 9A.32.050)
- XI Assault 1 (RCW 9A.36.011)

3) RCW 9.94A.360(9):

(9) If the present conviction is for Murder 1 or 2, Assault 1, Kidnaping 1, or Rape 1, count three points for prior adult and juvenile convictions for crimes in these categories, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.